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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-258

BUCYRUS-ERIE COMPANY,

Petitioner,

vs.

THE DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS OF THE STATE OF WISCONSIN, ET AL.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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JURISDICTION

The Opinion and Judgment of the Court of Appeals was entered on May 24, 1979 (Appendix A). This Court's jurisdiction is invoked pursuant to the terms of 28 U. S. C. § 1254(1).

QUESTION PRESENTED

Whether the Employee Retirement Income Security Act of 1974 preempts Wisconsin's effort to regulate the contents of a multi-state employee welfare benefit plan by means of the state fair employment practices statute.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The provisions involved herein include the following: U. S. Constitution, Article VI, Clause 2; 29 U. S. C. § 1003(a); 29 U. S. C. § 1002(3); 29 U. S. C. § 1144; Wisconsin Statutes, § 111.31(3), reproduced as Appendix C.

STATEMENT OF THE CASE

Petitioner, the Bucyrus-Erie Company,[1] commenced this action by filing a complaint for declaratory and injunctive relief in the United States District Court for the Eastern District of Wisconsin on February 15, 1978. The action, which sought to enjoin an administrative hearing of the Department of Industry, Labor and Human Relations of the State of Wisconsin,[2] alleged that the State's effort to adjudicate a sex discrimination charge filed against the Company's employee welfare benefit plan conflicted with, and was therefore preempted by, the Employee

1. Hereinafter referred to as the Company.

2. Hereinafter referred to as DILHR.

Retirement Income Security Act of 1974. 29 U. S. C. § 1001, *et seq.*[3]

The genesis of this action traces back to July 5, 1973, the date upon which the Company hired Ms. Martha Wasilik as a corporate secretary. After a period of approximately two years of employment, Ms. Wasilik began making inquires about the Company's pregnancy disability policy. Dissatisfied with the type of leave policies enforced by the Company,[4] Ms. Wasilik, on September 29, 1975, filed charges with the Equal Employment Opportunity Commission alleging that the Company's disability policy was sex discriminatory. On October 2, 1975, Ms. Wasilik filed similar charges with DILHR.[5]

The Company filed a Motion to Dismiss the state administrative charge pending before DILHR on February 3, 1978. The Motion to Dismiss was based upon the grounds that state efforts to regulate any facet of the welfare benefit plan which the Company provided for its employees was expressly preempted by Federal law. The Company argued that under the terms of ERISA, and the Commerce Clause of the United States Constitution, Art. I, § 8, the State administrative agency was with-

3. Hereinafter referred to as ERISA.

4. Under the terms of the Company's Employee Medical Benefits Plan then in effect, each employee was granted a limited number of sick days. When an employee was ill and could not report for work that employee could utilize a sick day. The Company continued to furnish all employee benefits during sick days. When an employee sought a pregnancy leave, however, the Company required that employee to take a leave of absence. Ms. Wasilik's Complaint alleged that the Company's policy of requiring employees to take a leave of absence for pregnancy rather than permitting those employees to utilize accumulated sick days resulted in a loss of employee benefits and was therefore a form of sex-based discrimination. It is quite clear that the Company's policy was not a form of sex-based discrimination within the ambit of any of the then existing Federal anti-discrimination statutes. *See G. E.* v. *Gilbert,* 429 U. S. 125, 97 S. Ct. 401 (1976).

5. On October 10, 1975, Ms. Wasilik was, in fact, granted a leave of absence due to pregnancy. That leave was granted in accordance with the stated Company policies then in effect. See footnote 4, *supra.*

out jurisdiction to adjudicate the issue before it. The Motion was summarily denied on March 9, 1978.

The instant Complaint was filed thereafter in order to protect the rights of the Company. On July 10, 1978, after finding that no material issues of fact were in dispute, the District Court entered its order dismissing the Company's Complaint. The terse opinion of the District Judge concluded that:

> "The problem in this case is that we are dealing with two laws—one state and one federal—that seek to regulate separate activities although some overlapping areas exist between them.
>
> "ERISA deals with employee benefit plans. The Wisconsin Fair Employment Act does not specifically address private employee benefit plans. Rather, this Act is designed to prohibit discrimination in employment and is grounded on the state's police power. It does not impinge on federal regulation of employee benefit plans."

On appeal, the Seventh Circuit affirmed the decision of the District Court. Expressly acknowledging a conflict between its opinion and the decision of the Second Circuit in *Pervel Industries, Inc.* v. *State of Connecticut Commission on Human Rights and Opportunities,* ..... F. 2d ..... (2d Cir. 1979), *cert. filed,* No. 79-109, the court stated:

> "As the court in *Merry,* we believe that there is evidence outside Section 514 of ERISA revealing a congressional intent to preserve the application of state fair employment laws in general, and pregnancy disability laws in particular. We find, however, that this intention to except state fair employment laws from preemption need not be implied. Instead, we rely on this evidence of intent to conclude that the preemption of state fair employment laws would operate to 'alter, amend, modify, invalidate, impair or supersede' another federal 'law, rule or regulation' in contravention of an express exception in Section 514 of ERISA, 29 U. S. C. § 1144(d)."

The court, therefore, concluded that while the State's effort to apply its Fair Employment Practices Act to the Company's

employee welfare benefit plan does fall within the ambit of ERISA's preemption provision, it is preserved from preemption by the express terms of Section 514(d).

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

I. The Decision of the Seventh Circuit Conflicts with Recent Decisions of Other Circuit Courts of Appeal.

In affirming the decision of the District Court, the Seventh Circuit focused upon the language of Section 514(d) of ERISA. 29 U. S. C. § 1144(d). Under the terms of that provision:

> "Nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States (except as provided in Sections 1031 and 1137(b) of this title) or any rule or regulation issued under any such law."

In a far reaching opinion, the Circuit Court judicially amended Section 514(d), holding that the statutory language preserved not only federal law, but also certain state laws. The court stated:

> "Preemption of state fair employment laws would at a minimum 'alter,' and probably 'impair,' the Congressional scheme for preventing and penalizing employment discrimination in the administration of welfare benefit plans in contravention of Section 514(d). This conclusion derives support from a variety of sources: the provisions and legislative history of Title VII, the legislative history of ERISA, and the legislative history of the recently enacted federal pregnancy disability amendments to Title VII."

The Seventh Circuit's interpretation of Section 514(d), however, is in direct conflict with decisions of both the Second and Ninth Circuits. The issue of ERISA preemption of state anti-discrimination statutes was examined by the Second Circuit in *Pervel Industries Inc.* v. *State of Connecticut Commis-*

sion on Human Rights and Opportunities, ... F. 2d ..... (2d Cir. 1979), aff'g 468 F. Supp. 490 (D. Conn. 1978). In concluding that ERISA does preempt state efforts to apply anti-discrimination laws to employee welfare benefit plans, the court both affirmed and adopted the decision of the District Court. As in the case at bar, both the Second Circuit and District Court were presented with the argument that Section 514(d) of ERISA must be interpreted so as to preserve not only federal but also state anti-discrimination statutes. Rejecting that argument, the court stated:

> "This Court does not accept the reasoning of this double savings clause contention. Section 514(d) of ERISA preserves *federal* law. Connecticut's anti-discrimination law does not become a federal law simply because Title VII preserves its validity as against a claim of preemption by Title VII. Nor is the textual argument significantly enhanced by focusing on § 514(b)'s requirement that ERISA should not be construed to 'impair' any law of the United States. Preemption of Conn. Gen. Stat. § 31-126(g) by ERISA does not impair any federal law. Title VII did not create new authority for state anti-discrimination laws; it simply left them where they were before the enactment of Title VII." (468 F. Supp. at 493).

A similar "double savings clause contention" was presented to the Ninth Circuit in *Hewlett-Packard Co.* v. *Barnes,* 571 F. 2d 502 (9th Cir. 1978). The court was there asked to determine whether the Knox-Keene Health Service Plan Act of 1975 was preempted as applied to federally regulated employee welfare benefit plans. As in the case at bar, the State of California argued that its Health Care Plan Act represented a regulatory scheme which was specifically recognized and preserved by the Health Maintenance Organization Act, 42 U. S. C. § 300 (e), *et seq.* In their view, preemption of the state statute would necessarily impair the federal regulatory scheme, a result which was proscribed by Section 514(d) of ERISA. The court, in rejecting that argument, stated as follows:

> "The error in the argument is that ERISA only preempts Knox-Keene as applied to employee benefit plans, and there is nothing to indicate that any HMO is an employee benefit plan. Appellant suggests that some HMOs may in the future 'transform' into employee benefit plans to avoid state regulation, but fails to point out any example of such 'transformation' or, for that matter, any specific conflict between ERISA and the HMO Act. We decline to upset ERISA's preemptive clause on such hypothetical grounds." (571 F. 2d at 504).

It is therefore apparent that by extending the scope of Section 514(d) to preserve not only federal law, but also state law, the Seventh Circuit has come into direct conflict with both the Second and Ninth Circuits.[6] Such conflict can only be resolved by Supreme Court review.

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6. In adopting this "double savings clause" argument, the court also ignored the legislative history of ERISA. Senators Williams and Javits discussed the impact of ERISA on state age discrimination statutes. In concluding that such statutes would be preempted, in spite of the fact that they are specifically preserved by federal law, the Senators stated:

> "MR. JAVITS. Finally, Mr. President, it is understood that just as these age discrimination amendments do not interfere with ERISA, State age discrimination in employment laws also are not to interfere with ERISA. The ADEA itself, as pointed out in the Senate report, does not preempt such State age discrimination laws. However, there should be no question that the preemption rules of Section 514(a) of ERISA shall be determinative regarding the preemption of State age discrimination laws which directly or indirectly establish requirements relating to employee benefit plans. ERISA preemption of State age discrimination laws shall be determined without regard to Section 514(d) of ERISA or the fact that the ADEA does not itself preempt State law.
>
> "MR. WILLIAMS. I concur in my friend's observations as they accurately state the controlling principles of law in this regard. *Federal law will preempt State age discrimination statutes only to the extent that those laws relate to an employee benefit plan described in Section 4(a) of ERISA and are not exempt under Section 4(b) of ERISA.*" 124 Cong. Rec. § 4451 (daily ed. March 23, 1978), as corrected, 124 Cong. Rec. § 4767 (daily ed. April 4, 1978) (Emphasis added.)

II. The Decision of the Seventh Circuit Subjects the Company to Inconsistent Regulation of Its Employee Welfare Benefit Plan, a Result Which Is Contrary to the Purpose of ERISA.

In enacting ERISA, Congress sought to eradicate a host of problems which had plagued employee benefit plans. One specific area of concern involved the inconsistent standards of state regulation faced by multi-state employers. Senator Harrison Williams, Chairman of the Senate Committee on Labor and Public Welfare, emphasized the importance of uniform regulation in the ERISA scheme:

> "It should be stressed that with the narrow exceptions specified in the bill, the substantive and enforcement provisions of the conference substitute are *intended to preempt the field for Federal regulation, thus eliminating the threat of conflicting or inconsistent State or local regulation of employee benefit plans.* This principle is intended to apply in its broadest sense to all actions of State or local governments, or any instrumentality thereof, which have the force or effect of law." 120 Cong. Rec. 29,933 (1974) (Emphasis added.)

Congressman John Dent, Chairman of the Subcommittee on Labor of the House Labor and Education Committee, expressed a similar view:

> "Finally, I wish to make note of what is to many the crowning achievement of this legislation, the reservation to Federal authority the sole power to regulate the field of employee benefit plans. With the preemption of the field, we round out the protection afforded participants *by eliminating the threat of conflicting and inconsistent State and local regulation.*" 120 Cong. Rec. 29,197 (1974). (Emphasis added.)

It is that "crowning achievement," uniform regulation, which has been wholly disrupted by the decision of the Seventh Circuit. Bucyrus-Erie Company is a multi-state employer with facilities located in over thirteen (13) states. Of particular import are Company employees located in Wisconsin, and em-

ployees located in New York, a jurisdiction which is subject to the decision in *Pervel Industries.* Bucyrus-Erie is therefore presented with precisely the situation Congress sought to avoid in enacting ERISA; coextensive and conflicting federal and state regulation of one employee welfare benefit plan.

The decision of the Seventh Circuit therefore deprives Bucyrus-Erie of the primary protection afforded by ERISA, uniform regulation of employee welfare benefit plans. The import of that issue to all multi-state employers cannot be overstated. It is therefore submitted that prompt review of the issue by this Court is appropriate.

CONCLUSION

The Seventh Circuit's application of ERISA's express preemption provision does not and in fact cannot be reconciled with the decisions of the Second and Ninth Circuits. Indeed, it is submitted that the Seventh Circuit's decision ignores ERISA's lengthy legislative history mandating the preemption of any and all state statutes which relate to an employee welfare benefit plan. Furthermore, the issue presented seeks clarification of the threshold right of all ERISA plans; *i.e.,* uniform regulation under federal law.

For all of the foregoing reasons, Petitioner prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit in this case.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit

No. 78-2079
BUCYRUS-ERIE COMPANY, a corporation,
Plaintiff-Appellant,

v.

THE DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS OF THE STATE OF WISCONSIN, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Wisconsin.
No. 78 C 99 —Robert W. Warren, *Judge.*

ARGUED FEBRUARY 14, 1979—DECIDED MAY 24, 1979

Before CUMMINGS and SPRECHER, *Circuit Judges,* and LEIGHTON, *District Judge.**

SPRECHER, *Circuit Judge.* The plaintiff, Bucyrus-Erie Co., appeals from the district court judgment denying its request to enjoin various officers of the state of Wisconsin from exercising jursdiction under the Wisconsin Fair Employment Act, Wis. Stat. §§ 111.31-111.37, over a complaint alleging that plaintiff's employee disability benefit plan is sex discriminatory. The primary issue presented by this appeal is whether the Employee

* The Honorable George N. Leighton, District Judge of the United States District Court for the Northern District of Illinois, is sitting by designation.

Retirement Income Security Act [ERISA], 29 U. S. C. §§ 1001-381, preempts the application of state fair employment laws to employee benefit plans.

I

The facts of the case are not in dispute. Bucyrus-Erie Co. is a Delaware corporation with its corporate headquarters located in Wisconsin. In October 1975, Martha Wasilik, a secretary in the employ of Bucyrus-Erie, requested a leave of absence on the basis of pregnancy. Ms. Wasilik was granted a leave of absence in accordance with company policy.

Under the terms of the company's employee medical benefits plan as then in effect, pregnant employees were only permitted leave from work on an unpaid basis. They were not entitled to utilize accumulated sick-leave benefits. Such benefits were available only for illness, excluding pregnancy. In the fall of 1975, Ms. Wasilik filed charges with the Equal Employment Opportunity Commission and the Wisconsin Department of Industry, Labor and Human Relations (DILHR) alleging that this provision of the company's disability policy was sex discriminatory.

Before the date of the state hearing, the company filed a motion to dismiss alleging that state regulation of the company's disability plan was preempted by federal law. The motion to dismiss was denied but a motion to stay was granted on February 14, 1978.

After losing the motion to dismiss before the state commission, the company promptly commenced this action in the district court seeking to enjoin the Wisconsin state officers from proceeding with the charges in violation of federal law. The lower court dismissed the plaintiff's complaint, rejecting the argument that the state of Wisconsin was engaging in impermissible regulation of the plaintiff's disability plan. We affirm the lower court's dismissal of the complaint.

II

The principal issue presented by this appeal is whether the Employee Retirement Income Security Act, 29 U. S. C. §§ 1001-381 preempts the application of the Wisconsin Fair Employment Act, Wis. Stat. §§ 111.31-111.37, to employee welfare benefit plans which are regulated by ERISA.[1] Although the statute is not unambiguous, we conclude that Congress did not intend to preempt the enforcement of state fair employment laws, and we therefore affirm.

Although ERISA's substantive provisions are designed to regulate retirement benefit plans[2] the Act includes other types of benefit plans within its coverage.[3] The parties are in agree-

1. The plaintiff also argues that Wisconsin's application of the fair employment act to the plaintiff places an undue burden on interstate commerce in violation of the Commerce Clause of the United States Constitution. Art. I, § 8, cl. 3. In *Pike* v. *Bruce Church, Inc.*, 397 U. S. 137, 142 (1970), it was established that

> [w]here the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.

The state does have a strong local interest in prohibiting employment discrimination. *Colorado Anti-Discrimination Commission* v. *Continental Air Lines, Inc.*, 372 U. S. 714 (1963). We adopt the district court's finding that the balance of interests weighs in favor of the state. *Cf. Wadsworth* v. *Whaland*, 562 F. 2d 70 (1st Cir. 1977), *cert. denied*, 435 U. S. 980 (1978).

2. *See generally Nachman Corp.* v. *Pension Benefit Guaranty Corp.*, 592 F. 2d 947 (7th Cir. 1978).

3. 29 U. S. C. § 1003 provides that with certain exceptions, the Act applies to "any employee benefit plan" meeting the interstate commerce prerequisites. An "employee benefit plan" is defined in § 1002:

> (1) The terms "employee welfare benefit plan" and "welfare plan" mean any plan . . . established or maintained by an employer or by an employee organization, or by both . . . for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, . . . medical, surgical, or hospital care or benefits, or benefits in the

(Footnote continued on next page.)

ment that the Bucyrus-Erie plan governing pregnancy leave is a plan subject to the applicable requirements of ERISA. The fact that the Bucyrus-Erie benefit plan is the subject of federal regulation does not of course inevitably require the preemption of concurrent state regulation.

The principles for determining whether a state law is preempted are well established. If a state and federal regulation directly conflict, the Supremacy Clause, U. S. Const., art. VI, has been interpreted to mandate preemption whenever the state action "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines* v. *Davidowitz*, 312 U. S. 52, 67 (1941). Absent a direct conflict, preemption "depends on the intent of Congress." *Malone* v. *White Motor Corp.*, 435 U. S. 497, 504 (1978). Congressional intent may be express or implied. Preemption may be implied when the "structure and purpose" of the federal act presuppose exclusive federal regulation. *Jones* v. *Rath Packing Co.*, 430 U. S. 519, 525 (1977); *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218, 230 (1947). If the intention to preempt is express, the statutory need for preemption is of no consequence.

ERISA does not include any substantive provisions prohibiting an employer from maintaining discriminatory benefit plans. For this reason, we are unable to perceive any direct conflict in the application of both ERISA and the Wisconsin fair employment laws to the Bucyrus-Erie plan. Thus it would be appropriate to require preemption of the Wisconsin statute only if Congress has clearly expressed an intention to effect such preemption.

(Footnote continued from preceding page.)

> event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services. . . .
>
> . . . .
>
> (3) The term "employee benefit plan" or "plan" means an employee welfare benefit plan or an employee pension benefit plan. . . .

ERISA does contain express language of preemption. Section 514 of ERISA, 29 U. S. C. § 1144, provides:

> (a) Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.
>
> . . . .
>
> (b)(2)(A) Except as provided in subparagraph (B), nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities.
>
> . . . .
>
> (4) Subsection (a) of this section shall not apply to any generally applicable criminal law of a State.
>
> (c) For purposes of this section:
>
> (1) The term "State law" includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State. . . .
>
> . . . .
>
> (d) Nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States (except as provided in section 1031 and 1137(b) of this title) or any rule or regulation issued under any such law.

The statute appears to require preemption if the Wisconsin employment law "relates" to an employee benefit plan, as Congress intended to use that term, unless preemption would "alter, amend, modify, invalidate, impair, or supersede" any other federal law, rule or regulation under § 514(d). 29 U. S. C. § 1144(d).

The initial inquiry—whether the Wisconsin fair employment laws "relate" to employee benefit plans—is a difficult one. The Wisconsin Fair Employment Act is a statute of general appli-

cation and not specifically designed to regulate an employer's administration of welfare benefit plans. The statute prohibits discrimination in employment on the basis of "age, race, creed, color, handicap, sex, national origin or ancestry." Wis. Stat. § 111.31(3). Prohibited acts of sex discrimination may encompass an employer's refusal to hire, termination, or the grant of promotions, and determination of compensation as well as other terms and conditions of employment. § 111.32(g)(1). It is therefore clear that discrimination against pregnant women in the availability of disability benefits is a form of sex discrimination under the Wisconsin Act[4] and is just one of many specific actions which falls within the general reach of the statute.

In determining whether Congress intends to preempt State laws of general application, the Supreme Court recently characterized their cases in the field of labor preemption as "consistently recogniz[ing] that a congressional intent to deprive the States of their power to enforce such general laws is more difficult to infer than an intent to pre-empt laws directed specifically at concerted activity." *New York Telephone Co.* v. *New York State Department of Labor,* 47 USLW 4303, 4306 (March 21, 1979). The issue, however, remains one of intention, and section 514 strongly suggests that a statute of general applicability may nonetheless "relate" to a benefit plan.

This intention to include state laws of general applicability within the scope of preemption is readily inferred from the framework of the provisions of section 514.[5] Congress specifically enumerated four exceptions to the broad scope of preemption. One of those exceptions, section 514(b)(4), exempts

4. Although the statute does not expressly prohibit dissimilar treatment on the basis of pregnancy, the Wisconsin Supreme Court found that such actions constitute sex-based discrimination prohibited under the state statute. *Ray-O-Vac* v. *Department of Industry, Labor & Human Relations,* 70 Wis. 2d 919, 236 N. W. 2d 209 (1975).

5. It is also apparent from the legislative history discussed *infra.*

"any *generally applicable* criminal law of a State." 29 U. S. C. § 1144(b)(4). (emphasis supplied). This provision indicates an intention that the word "relate" extend even to laws of general applicability (as well as an intention to preempt criminal statutes limited in application to welfare benefit plans). The exception would otherwise have been unnecessary. Additionally, the definition of "state" contained in the Act supports this conclusion. The definition includes any instrumentality which "purports to regulate, directly or *indirectly,* the terms and conditions of employee benefit plans. . . ." 29 U. S. C. § 1144(c)(2). (emphasis supplied).

It is also legitimate to inquire whether the term "relate" might properly be narrowed to preempt only those state laws which would operate to frustrate or interfere with the administration of ERISA. As discussed *supra,* the State Fair Employment law does not impose requirements on employee benefit plans that are in conflict with ERISA. This narrow interpretation of the term "relate" has led some courts to conclude that state fair employment statutes do not "relate" to benefit plans within ERISA's preemptive scope. *Gast* v. *Oregon,* 18 Fair Empl. Prac. Cas. (BNA) 210 (Oregon Ct. App. 1978); *Time Insurance Co.* v. *Department of Industry, Labor and Human Relations,* 16 Fair Empl. Prac. Cas (BNA) 391 (Wis. Cir. Ct. 1978); *Cf. Buczynski* v. *General Motors Corp.,* 456 F. Supp. 867, 873 (D. N. J. 1978); *But see Goodyear Tire & Rubber Co.* v. *Dept. of Industry, Labor and Human Relations,* No. 77-650 (Wisc. Ct. App., Nov. 22, 1978); Hutchinson and Ifshin, *Federal Preemption of State Law Under the Employee Retirement Income Security Act of 1974,* 46 U. Chi. L. Rev. 23, 52-58 (1978). Despite the appeal of this accommodating construction, the legislative history precludes so narrow a reading of the term "relate."

The legislative history of ERISA's preemption section has been thoroughly discussed in *Hewlett-Packard Co.* v. *Barnes,* 425 F. Supp. 1294, 1298-1300 (N. D. Cal. 1977), *aff'd,* 571 F. 2d 502 (9th Cir. 1978). The history reveals that as originally

passed out of the Senate and House, ERISA was structured to preempt only state regulation which overlapped with the requirements imposed by ERISA. The Conference Committee substituted a preemption section substantially more expansive. Senator Jacob Javits stressed the import of the conferees' change:

> Both House and Senate bills provided for preemption of State law, but—with one major exception appearing in the House bill—defined the perimeters of preemption in relation to the areas regulated by the bill. Such a formulation raised the possibility of endless litigation over the validity of State action that might impinge on Federal regulation, as well as opening the door to multiple and potentially conflicting State laws hastily contrived to deal with some particular aspect of private welfare or pension benefit plans not clearly connected to the Federal regulatory scheme.
>
> Although the desirability of further regulation—at either the State or Federal level—undoubtedly warrants further attention, on balance, the emergence of a comprehensive and pervasive Federal interest and the interests of uniformity with respect to interstate plans required—but for certain exceptions—the displacement of State action in the field of private employee benefit programs. The conferees—recognizing the dimensions of such a policy—also agreed to assign the Congressional Pension Task Force the responsibility of studying and evaluating preemption in connection with State authorities and reporting its findings to the Congress. If it is determined that the preemption policy devised has the effect of precluding essential legislation at either the State or Federal level, appropriate modifications can be made.

120 Cong. Rec. 29942 (1974).[6]

As the district court in *Hewlett* concluded:

> Overall, the legislative history reveals both that Congress carefully considered the question of preemption, including the feasibility of enacting a more limited preemption provision, and that Congress ultimately enacted Section 514(a) with the express purpose of summarily preempting state regulation of ERISA-covered employee benefit plans.

425 F. Supp. at 1300.

6. This quotation represents one of many references in the legislative history supportive of expansive preemption. *See* 425 F. Supp. at 1298-1300.

Therefore we do not think the section can properly be limited to preempt only those state laws which are specifically related to employee benefit plans or which only relate to these plans by imposing requirements inconsistent with ERISA. Nor can we conclude that the Wisconsin fair employment law, which would regulate certain "terms and conditions" of welfare benefit plans, relates to such plans "only in the most remote and peripheral manner." *AT&T* v. *Merry*, ... F. 2d ....., ... (2d Cir. January 29, 1979); *Stone* v. *Stone*, 450 F. Supp. 919, 932 (N. D. Cal. 1978). A fair reading of the statute and the legislative history requires the conclusion that this Wisconsin statute "relates" to employee benefit plans unless otherwise excepted. This conclusion has been reached by several courts. *Pervel Industries Inc.* v. *Connecticut Commission on Human Rights*, ... F. Supp. ....(D. Conn. 1978), *aff'd.*, ... F. 2d ..... (2d Cir. April 23, 1979); *Mountain States Telephone & Telegraph Co.* v. *Commissioner of Labor and Industry*, Pens. Rep. (BNA), No. 210, at D-1 (D. Mont., Oct. 16, 1978); *Goodyear Tire & Rubber Co.* v. *DILHR*, No. 77-650 (Wisc. Ct. App., Nov. 22, 1978).

The Second Circuit, in *AT&T* v. *Merry*, found that in some circumstances it is appropriate to imply congressional exceptions to ERISA preemption. In *Merry*, the court found that a state court judgment ordering the garnishment of an employee's pension income to satisfy a divorce obligation was not preempted by ERISA.[7] The court premised this exception on the tradition of federal deference to state regulation of family law, the Con-

7. The issue presented in *Merry* is particularly difficult because section 206(d)(1), 29 U. S. C. § 1056(d)(1), prohibits the involuntary assignment or alienation of pension benefits.

gressional concern manifested in ERISA to maintain the well-being of an employee's family as well as the employee, and the federal policy, manifested in other Congressional statutes, of enforcing support obligations. A similar result was reached in the lower court decisions in *Stone* v. *Stone*, 450 F. Supp. 919 (N. D. Cal. 1978) and *Cody* v. *Riecker*, 454 F. Supp. 22 (E. D. N. Y. 1978). *But see Francis* v. *United Technologies Corp.*, 458 F. Supp. 84 (N. D. Cal. 1978).

As the court in *Merry*, we believe that there is evidence outside section 514 of ERISA revealing a congressional intent to preserve the application of state fair employment laws in general, and pregnancy disability laws in particular. We find, however, that this intention to except state fair employment laws from preemption need not be implied.[8] Instead, we rely on this evidence of intent to conclude that the preemption of state fair employment laws would operate to "alter, amend, modify, invalidate, impair or supersede" another federal "law, rule or regulation" in contravention of an express exception in section 514 of ERISA. 29 U. S. C. § 1144(d).

Two cases addressing this issue have concluded that Title VII is not impaired in contravention of ERISA by the displacement of state fair employment laws. *Mountain State Telephone & Telegraph Co.* v. *Commissioner of Labor and Industry*, Pens. Rep. (BNA), No. 210, at D-1 (D. Mont. Oct. 16, 1978); *Pervel Industries Inc.* v. *Connecticut Commission on Human Rights*, ... F. Supp. ..... (D. Conn. 1978), aff'd ..... F. 2d ..... (2d Cir. 1979). While it is true that the Equal Economic Opportunities Commission will still be able to enforce the federal prohibitions against employment discrimination contained in Title VII, these decisions construe too narrowly the nature of the *federal* scheme embodied in Title VII.

Preemption of state fair employment laws would at a minimum "alter," and probably "impair," the Congressional scheme for

8. We express no opinion on when it might be appropriate to imply exceptions beyond those specifically enumerated in section 514.

preventing and penalizing employment discrimination in the administration of welfare benefit plans in contravention of section 514(d). This conclusion derives support from a variety of sources: the provisions and legislative history of Title VII, the legislative history of ERISA, and the legislative history of the recently enacted federal pregnancy disability amendments to Title VII.[9] Turning first to Title VII itself, it is clear that the federal scheme embodied in its laws, rules and regulations contemplates and encourages enforcement of state fair employment statutes as an integral component of the federal statutory framework. State laws are specifically preserved in two sections of Title VII and Title XI, section 708, 42 U. S. C. § 2000e-7, and section 1004, 42 U. S. C. § 2000h-4.[10]

Congress also designed an enforcement system premised on the enforcement and preservation of state fair employment laws. Federal agency action is deferred until a state has had an initial opportunity to remedy the employment discrimination charged. *See* 42 U. S. C. §§ 2000e-5(c), (d), (e). Further, under §2000e-5(b) the EEOC must "accord substantial weight to

9. In determining whether a particular statute contemplates preemption, the Supreme Court has frequently relied on Congressional intent expressed in other statutes to aid in that determination. *See New York Telephone Co.* v. *New York State Department of Labor*, 47 U. S. L. W. 4303, 4307-8 (March 21, 1979); *Malone* v. *White Motor Corp.*, 435 U. S. 497, 504 (1978).

10. Section 708 provides:

> Nothing in this title [VII] shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this title.

Section 1104 provides:

> Nothing contained in any title of this Act shall be construed as indicating an intent on the part of Congress to occupy the field in which any such title operates to the exclusion of State laws on the same subject matter, nor shall any provision of this Act be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this Act, or any provision thereof.

final findings and orders made by State or local authorities in proceedings commenced under State or local law" in determining whether there is reasonable cause to believe a discrimination charge. To preempt the application of state fair employment laws to employee benefit plans would also cause a regulatory void as to employers not subject to Title VII but operating plans covered by ERISA.

These provisions illustrate that Title VII was "designed to supplement, rather than supplant, existing laws and institutions relating to employment discrimination." *Alexander* v. *Gardner-Denver Co.*, 415 U. S. 36, 48-49 (1974). The Supreme Court in *Gardner-Denver* emphasized the role of state laws in the federal scheme. "[L]egislative enactments, in this area have long evinced a general intent to accord parallel or overlapping remedies against discrimination. In the Civil Rights Act of 1964, . . . Congress indicated that it considered the policy against discrimination to be of the 'highest priority.' . . . Consistent with this view, Title VII provides for consideration of employment-discrimination claims in several forums. . . ." *Id.* at 47.

The legislative history of Title VII also emphasizes the coordination with and utilization of state fair employment laws. Senator Humphrey explained that the Act "afforded every opportunity" to states to remedy discrimination and that Title VII could properly be characterized as a "States responsibility bill." 110 Cong. Rec. 122724-25 (1964). The intention to preserve and utilize fair employment laws manifested in Title VII is persuasive evidence that Congress did not intend to disrupt this scheme in the context of employee benefit plans.

The legislative history of ERISA also provides support for the conclusion that section 514(d), preserving federal law, should be construed to preclude preemption of state fair employment laws.[11] Senator Mondale and Representative Abzug

11. This preemption analysis might well be altered if the particular state employment law presumably preserved by 514(d) actually conflicted with the terms of ERISA. It would of course be a question of intent.

sought to include in ERISA provisions prohibiting discrimination in the administration of welfare benefit plans. Senator Williams assured Senator Mondale that such an amendment would be unnecessary and might undermine federal antidiscrimination efforts, stating: "I believe that . . . centralized administration of nondiscrimination in employment must be maintained. And I believe this can be done by the Equal Employment Opportunities Commission under terms of existing law." 119 Cong. Rec. 30409 (1973). Representative Dent reiterated in the House that discrimination could best be prohibited "under terms of existing law." 120 Cong. Rec. 4726 (1974). On this basis, ERISA was not amended to prohibit discrimination.

Thus Congress expressed an intention to preserve the "terms of existing law" in the field of employment discrimination. In view of the pervasive role of the states under Title VII, we conclude that "existing law" included state fair employment laws. Senator Williams's emphasis on centralizing enforcement in the EEOC should properly be interpreted as an attempt to prevent competing authority in other federal agencies and not as an intent to limit the role of the states since the EEOC itself purposefully utilizes the states.[12] In fact, the EEOC has appeared in this case as an amicus curiae to urge the preservation of state fair employment laws. As the Supreme Court has recently noted, the amicus position of an agency charged with the principal enforcement of an Act should be carefully considered. *Broadcast Music, Inc.* v. *Columbia Broadcasting System, Inc.*, 47 USLW 4359 (1979).

12. The EEOC's guidelines illustrate the degree of state and federal coordination in the prevention of employment discrimination. Section 5.2 of the EEOC Compliance Manual describes discrimination charges received by the state and federal agencies as a "common workload." The section states it is the policy of the EEOC to "striv[e] for an integrated charge processing system" with the states and allows for funding to the states to further shared administration.

Despite the EEOC's own use of state agencies, the district court in *Pervel, supra,* found that an intent to centralize federal antidiscrimination efforts in the EEOC was inconsistent with inferring an intent to preserve state law.

The history of the recently enacted Pregnancy Disability Act, 92 Stat. 2076, P. L. 95-555, also suggests the propriety of this conclusion. The statute amends Title VII to prevent discrimination in granting disability benefits to pregnant women. The Senate Report states that the existing provisions of Title VII preserving state law would permit the states with laws prohibiting pregnancy-based discrimination to "continue . . . to enforce their state laws if this bill were enacted." S. Rep. No. 95-331, 95th Cong., 1st Sess. 3 n. 1 (1977). This statement is particularly significant since the major application of laws prohibiting pregnancy discrimination is in the context of employee benefit plans. To preempt such laws under ERISA as they "relate" to employee benefit plans would certainly vitiate this Congressional statement that the states may continue to enforce such laws.

Similar authority appears in the House Report to the bill. The extent to which the act would impose a new financial burden on employers was a central issue surrounding passage of the bill. The report concludes that the financial impact would be minimal since many employers were already required by state law to treat pregnancy similar to other disabilities. The report concludes:

> At least 22 States, including the most populous States, now mandate some form of pregnancy disability coverage. . . . The significance of this State coverage for HR 6075 (PL 95-555) is manifold: First, many employers are *already* under a State law obligation to provide benefits to pregnancy disabled workers. Passage of the bill thus has little or no economic impact on such employers. Second, employers who operate in several states face different requirements depending on the State; likewise, the rights of pregnant employees depend on the laws of the State in which they are employed.

H. Rep. No. 85-948, 95th Cong., 2d Sess. at 11 (1978) (emphasis added.) For what it is worth, it is clear that Congress passed pregnancy disability legislation with the assumption that state pregnancy disability laws were in full effect. We construe this as further evidence that state fair employment laws were considered to be fully embedded in the Title VII scheme for eradicating employment discrimination.[13]

Although some authorities have suggested that state fair employment laws are preempted,[14] we join the authorities conclud-

13. The second circuit's brief affirmance of *Pervel Industries, supra,* infers that state fair employment laws were preempted by ERISA but were somehow reinstated by the passage of the federal pregnancy disability act. The court states:

> This case arose before the amendment of Title VII in October 1978 by the Pregnancy Disability Act. . . . At that time state statutes, except those specifically excluded, were preempted by ERISA "insofar as they may . . . relate to any employee benefit plan." 29 U. S. C. § 1144(a).

..... F. 2d ....., ...

Similarly confusing is Senator Javits's explanation of a new bill proposing amendments of the ERISA preemption provisions. The bill, S. 209, reprinted in 125 Cong. Rec. 560 (daily ed. Jan. 24, 1979), broadens the preemption exceptions. Senator Javits stated in the Senate, "Our bill does not address State sex discrimination laws . . . because passage of the pregnancy sex discrimination amendments, . . . appears to have mooted the issue of preemption of State laws requiring disability plans to cover pregnancy-related leave." *Id.* at 575.

We are unaware of any provision of the Pregnancy Disability Act designed to amend ERISA. We rely on the Act and its history only to demonstrate the Congressional view of the States' role in the Title VII scheme. We do not think the Pregnancy Disability Act in any way modifies the preemption provisions of ERISA—it only serves to clarify the application of the 514(d) exception.

14. *See* cases cited *supra* at 10. Statements of Senators Williams and Javits examining the effect of ERISA preemption on state age discrimination statutes also support the view that state fair employment laws are preempted.

> Mr. Javits. Finally, Mr. President, it is understood that just as these age discrimination amendments do not interfere with ERISA, State age discrimination in employment laws also are not to interfere with ERISA. The ADEA itself, as pointed out in the Senate report, does not preempt such State age discrimination laws. However, there should be no question that the preemption rules of section 514(a) of ERISA shall be determinative regarding the preemption of State age discrimination

(Footnote continued on next page.)

ing that the balance of the evidence suggests that Congress did not intend to preempt state fair employment laws since such preemption would "alter, amend, modify . . . [or] impair" the federal framework for prohibiting employment discrimination. *See, Goodyear Tire & Rubber Company* v. *Department of Industry, Labor and Human Relations,* No. 77-650 (Wis. Ct. App., Nov. 22, 1978); *Liberty Mutual Insurance Co.* v. *State Division of Human Rights,* 61 A. D. 2d 822, 402 N. Y. S. 2d 218 (App. Div. 1978). *Cf. Wadsworth* v. *Whaland,* 562 F. 2d 70 (1st Cir. 1977), *cert. denied,* 435 U. S. 980 (1978).[15]

The judgment is affirmed.

A true Copy:

Teste: *Clerk of the United States Court of Appeals for the Seventh Circuit*

(Footnote continued from preceding page.)

laws which directly or indirectly establish requirements relating to employee benefit plans. ERISA's preemption of State age discrimination laws shall be determined without regard to section 514(d) of ERISA or the fact that the ADEA does not itself preempt State law.

MR. WILLIAMS. I concur in my friend's observations as they accurately state the controlling principles of law in this regard. *Federal law will preempt State age discrimination statutes only to the extent that those laws relate to an employee benefit plan described in section 4(a) of ERISA and are not exempt under section 4(b) of ERISA.*

124 Cong. Rec. S4451 (daily ed. March 23, 1978), as corrected 124 Cong. Rec. S4767 (daily ed. April 4, 1978) (emphasis added).

However, Senator Javits, reporting to the Senate committee overseeing ERISA, stated that ERISA preemption "may have gone further than desirable" since state statutes regulating health care service plans were found preempted in judicial decisions. Senator Javits expressed concern that "other areas of potential conflict" might include the preemption of state fair employment laws. Senate Committee on Human Resources, 95th Cong., 1st Sess., Oversight of ERISA at 61 (1977). *See also* Senator Javits's most recent preemption observations in note 13 *supra.*

15. In *Wadsworth,* the First Circuit found that the McCarren-Ferguson Act policy of preserving state regulation of insurance is impliedly "reaffirmed" by section 514(d) of ERISA. 562 F. 2d at 78. We note however that the preservation language in the McCarren Act is broader than the preservation language incorporated in Title VII. *Compare* 15 U. S. C. § 1012 *with* 42 U. S. C. § 2000h-4.

APPENDIX B

BUCYRUS-ERIE COMPANY,

Plaintiff,

vs.

The DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS OF the STATE OF WISCONSIN, and Virginia Hart, Hugh Henderson, and John Hayon, Commissioners of the Department and Nancy Newbury, Administrator of the Equal Rights Division of the said Department, Defendants.

No. 78-C-99.

United States District Court,
E. D. Wisconsin.

July 10, 1978.

MEMORANDUM AND ORDER

WARREN, *District Judge.*

This is a civil action filed on February 15, 1978 wherein the plaintiff, Bucyrus-Erie Company (Bucyrus-Erie), seeks to enjoin the defendants, Wisconsin Department of Industry, Labor and Human Relations (DILHR), and five individual state officers from exercising jurisdiction under the Wisconsin Fair Employment Act, Wis. Stats. §§ 111.31, et seq. over a complaint alleging that plaintiff's employee disability benefit plan is sex discriminatory because it fails to provide benefits for pregnancy disability.

Plaintiff contends that the Employee Retirement Income Security Act (ERISA), 29 U. S. C. § 1101, et seq. and the

Commerce Clause of the United States Constitution preempt DILHR's exercise of jurisdiction under the Wisconsin Fair Employment Act.

On April 14, 1978, plaintiff filed a motion to amend its complaint pursuant to Rule 15 of the Federal Rules of Civil Procedure. Subsequently, plaintiff filed a motion for judgment on the pleadings pursuant to Rule 12(c) of the Federal Rules of Civil Procedure. These motions are the subject of this memorandum and order.

Rule 15(a) provides that leave to amend "shall be freely given when justice so requires."

In light of the foregoing, the Court finds that plaintiff's motion to amend its complaint must be and is hereby GRANTED.

Before addressing the motion for judgment on the pleadings, a brief review of the facts is necessary.

On July 5, 1973, Martha Wasilik was hired by Bucyrus-Erie as a secretary. On October 10, 1975, she requested a leave of absence due to pregnancy. In accordance with its stated policy, Bucyrus-Erie granted that request.

On September 29, 1975, Ms. Wasilik filed charges with the Equal Employment Opportunity Commission (EEOC), alleging that Bucyrus-Erie's disability policy was sex discriminatory. On October 2, 1975, Ms. Wasilik filed similar charges with the Equal Rights Division of DILHR.

Under the terms of Bucyrus-Erie's Employee Medical Benefits Plan, each employee is granted a limited number of sick days. When an employee is ill and cannot report for work, that employee may utilize a sick day. The company continues to furnish all employee benefits during sick days. When an employee seeks a pregnancy leave, however, Bucyrus-Erie requires that employee to take a leave of absence. Ms. Wasilik's complaint alleged that the company's policy of requiring employees to take a leave of absence for pregnancy, rather than permitting those

employees to utilize accumulated sick days was a form of sex-based discrimination.

A hearing on the complaint was noticed for February 14, 1978. On February 3, 1978, Bucyrus-Erie filed a motion to dismiss the state charge, alleging that state efforts to regulate any facet of Bucyrus-Erie's welfare benefit plan for its employees was expressly preempted by federal law. This motion was denied on February 9, 1978. A motion to stay the February 14, 1978 hearing filed by Bucyrus-Erie was granted.

This action was then commenced on February 15, 1978. Basically, plaintiff's position rests upon two contentions. First, since the state action is an attempt to regulate an employee welfare benefit plan which is otherwise regulated by ERISA, the state is prevented from acting by reason of the broad preemptive provisions contained in ERISA. Secondly, plaintiff contends that to permit the state to act in this case would place an unreasonable burden on interstate commerce.

The basic issue for the Court's consideration is whether or not ERISA and the Commerce Clause of the United States Constitution preempt DILHR's efforts to exercise jurisdiction under the Wisconsin Fair Employment Act over a complaint alleging that plaintiff's employee disability benefit plan discriminates on the basis of sex by failing to provide benefits for pregnancy disability.

Section 1002(1) of 29 U. S. C. provides in relevant part:

> (1) The terms 'employee welfare benefit plan' and 'welfare plan' mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits,

> apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services . . .

Section 1144 of 29 U. S. C. provides in relevant part:

> (a) Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan . . .
>
> * * * * *
>
> (d) Nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States . . . or any rule or regulation issued under any such law.

ERISA was enacted to protect employee benefit rights. It sets safeguards for the operation of covered plans and establishes standards for the administration of pension plans in an attempt to minimize terminations of pension plans and losses to beneficiaries. *Nachman Corp.* v. *Pension Benefit Guaranty Corp.*, 436 F. Supp. 1334 (N. D. Ill. 1977); *see, also, Azzaro* v. *Harnett*, 414 F. Supp. 473 (S. D. N. Y. 1976), *aff'd.*, 553 F. 2d 93 (2nd Cir. 1977), *cert. denied*, 434 U. S. 824, 98 S. Ct. 71, 54 L. Ed. 2d 82 (1977).

The Wisconsin Fair Employment Act was designed to prevent discrimination in employment. *Wisconsin Telephone Co.* v. *Department of Industry, Labor and Human Relations*, 68 Wis. 2d 345, 227 N. W. 2d 634 (1975).

Wis. Stats. § 111.31 sets forth the purpose of the Act:

> (3) In the interpretation and application of this subchapter, and otherwise, it is declared to be the public policy of the state to encourage and foster to the fullest extent practicable the employment of all properly qualified persons regardless of their age, race, creed, color, handicap, sex, national origin or ancestry. This subchapter shall be liberally construed for the accomplishment of this purpose.

[1] It is well-settled that the question of whether a state statute is invalid under the supremacy clause depends upon the intent of Congress. *Malone* v. *White Motor Corp.*, 435 U. S. 497, 98 S. Ct. 1185, 55 L. Ed. 2d 443 (1978). In *Malone*, the court stated:

> Often Congress does not clearly state in its legislation whether it intends to pre-empt state laws; and in such instances, the courts normally sustain local regulation on the same subject matter unless it conflicts with federal law or would frustrate the federal scheme, or unless the courts discern from the totality of the circumstances that Congress sought to occupy the field to the exclusion of the States. *Ray* v. *Atlantic Richfield Co.*, 435 U. S. 151, ... [98 S. Ct. 988, ..., 55 L. Ed. 2d 179] (1978); *Jones* v. *Rath Packing Co.*, 430 U. S. 519, 525, 540-541 [97 S. Ct. 1305, 1309, 1316-1317, 51 L. Ed. 2d 604] (1977); *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218, 230 [67 S. Ct. 1146, 1152, 91 L. Ed. 1447] (1947). 'We cannot declare pre-empted all local regulation that touches or concerns in any way the complex interrelationships between employees, employers and unions; obviously, much of this is left to the state.' *Motor Coach Employees* v. *Lockridge*, 403 U. S. 274, 289, 91 S. Ct. 1909, 1919, 29 L. Ed. 2d 473 (1971).

In *Jones* v. *Rath Packing Co., supra*, the Supreme Court stated the view on preemption in the following manner:

> Where, as here, the field which Congress is said to have pre-empted has been traditionally occupied by the States, *see, e.g.*, U. S. Const., Art. I, § 10; *Patapsco Guano Co.* v. *North Carolina*, 171 U. S. 345, 358 [18 S. Ct. 862, 867, 43 L. Ed. 191] (1898), 'we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.' *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218, 230 [67 S. Ct. 1146, 1152, 91 L. Ed. 1447] (1947). This assumption provides assurance that 'the federal-state balance,' *United States* v. *Bass*, 404 U. S. 336, 349 [92 S. Ct. 515, 523, 30 L. Ed. 2d 488] (1971), will not be disturbed unintentionally by Congress or unnecessarily by the courts. But when Con-

> gress has 'unmistakably . . . ordained,' *Florida Lime & Avocado Growers, Inc.* v. *Paul,* 373 U. S. 132, 142 [83 S. Ct. 1210, 1217, 10 L. Ed. 2d 248] (1963), that its enactments alone are to regulate a part of commerce, state laws regulating that aspect of commerce must fall.

[2] From these decisions, it is clear that state statutes are presumed to be valid unless Congress clearly intended these statutes to be superseded by federal law.

The problem in this case is that we are dealing with two laws—one state and one federal—that seek to regulate separate activities although some overlapping areas exist between them.

ERISA deals with employee benefit plans. The Wisconsin Fair Employment Act does not specifically address private employee benefit plans. Rather, this Act is designed to prohibit discrimination in employment and is grounded on the state's police power. It does not impinge on federal regulation of employee benefit plans.

Although § 1144(a) of 29 U. S. C. states that ERISA supersedes state laws relating to employee benefit plans, it does not expressly provide that all state fair employment laws are likewise superseded.

The legislative history of the Act fails to indicate that Congress, by enacting ERISA, intended to preempt state fair employment laws as they may concern employee benefit plans.

Section 1144(d) does, in fact, provide that ERISA shall not be construed to alter, modify or supersede any law of the United States.

Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e, et seq., as amended, expressly preserves state laws such as the Wisconsin Fair Employment Act which are designed to prohibit employment discrimination. 42 U. S. C. §§ 2000e-7 and 2000h-4.

Title VII specifically provides that no charge may be filed with the EEOC under Title VII until sixty days after proceedings have been commenced under the state employment discrimination law, 42 U. S. C. § 2000e-5(c), 5(d) and 5(e). The EEOC must give substantial weight to state agency findings and orders and must cooperate with such agencies. 42 U. S. C. §§ 2000e-5(b), 2000e-8.

From an examination of the provisions of ERISA and its legislative history, and considering Congress' long-standing recognition of the importance of state employment discrimination laws, this Court finds that it is not clear that Congress intended to preempt the Wisconsin Fair Employment Act insofar as it prohibits sex discrimination in employee benefit plans.

[3] Because preemption is not clearly mandated in this Court's opinion, this Court declines to invalidate the Wisconsin Fair Employment Act against a claim of federal preemption grounded on ERISA. To hold otherwise, would also seriously impair the enforcement scheme of Title VII of the Civil Rights Act of 1964.

With respect to plaintiff's commerce clause argument, the court in *Pike* v. *Bruce Church, Inc.*, 397 U. S. 137, 142, 90 S. Ct. 844, 847, 25 L. Ed. 2d 174 (1970) stated:

> Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to putative local benefits.

[4] The state has a strong local interest in prohibiting employment discrimination. *Colorado Anti-Discrimination Commission* v. *Continental Air Lines, Inc.,* 372 U. S. 714, 83 S. Ct. 1022, 10 L. Ed. 2d 84 (1963). The state's interest in preventing sex discrimination against pregnant women workers is also a legitimate public interest.

[5] The burden imposed on interstate commerce in this case is not excessive and is clearly outweighed by the legitimate local public interest in preventing employment discrimination based

upon sex. *See, e.g., Walker Mfg. Co.* v. *Industrial Commission,* 27 Wis. 2d 699, 135 N. W. 2d 307 (1965).

Based on the foregoing reasoning and analysis, this Court finds that ERISA and the commerce clause of the United States Constitution do not preempt DILHR's exercise of jurisdiction under the Wisconsin Fair Employment Act. The Court finds that the state and federal laws are not in conflict and plaintiff is not entitled to the relief requested in its complaint.

Therefore, this Court hereby orders that this action be DISMISSED.

APPENDIX C

I. CONSTITUTION—ARTICLE VI, CL. 2:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

II. 29 U. S. C. § 1003(a);

> (a) Except as provided in subsection (b) of this section and in sections 1051, 1081, and 1101 of this title, this subchapter shall apply to any employee benefit plan if it is established or maintained—
>
> (1) by any employer engaged in commerce or in any industry or activity affecting commerce; or
>
> (2) by any employee organization or organizations representing employees engaged in commerce or in any industry or activity affecting commerce; or
>
> (3) by both.

III. 29 U. S. C. § 1002(3):

> (3) The term "employee benefit plan" or "plan" means an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan.

IV. 29 U. S. C. § 1144:

> (a) Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not

exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

Construction and Application

(b)(1) This section shall not apply with respect to any cause of action which arose, or any act or omission which occurred, before January 1, 1975.

(2)(A) Except as provided in subparagraph (B), nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities.

(B) Neither an employee benefit plan described in section 1003(a) of this title, which is not exempt under section 1003(b) of this title (other than a plan established primarily for the purpose of providing death benefits), nor any trust established under such a plan, shall be deemed to be an insurance company or other insurer, bank, trust company, or investment company or to be engaged in the business of insurance or banking for purposes of any law of any State purporting to regulate insurance companies, insurance contracts, banks, trust companies, or investment companies.

(3) Nothing in this section shall be construed to prohibit use by the Secretary of services or facilities of a State agency as permitted under section 1136 of this title.

(4) Subsection (a) of this section shall not apply to any generally applicable criminal law of a State.

Definitions

(c) For purposes of this section:

(1) The term "State law" includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State. A law of the United States applicable only to the District of Columbia shall be treated as a State law rather than a law of the United States.

(2) The term "State" includes a State, any political subdivisions thereof, or any agency or instrumentality

of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefi plans covered by this subchapter.

Alteration, Amendment, Modification, Invalidation, Impairment, or Supersedure of Any Law of United States Prohibited

(d) Nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States (except as provided in sections 1031 and 1137(b) of this title) or any rule or regulation issued under any such law.

V. WISCONSIN STATUTES, § 111.31(3):

(3) In the interpretation and application of this subchapter, and otherwise, it is declared to be the public policy of the state to encourage and foster to the fullest extent practicable the employment of all properly qualified persons regardless of their age, race, creed, color, handicap, sex, national origin or ancestry. This subchapter shall be liberally construed for the accomplishment of this purpose.

Supreme Court, U.S.
FILED
SEP 17 1979
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-258

BUCYRUS-ERIE COMPANY,
Petitioner,

v.

THE DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS OF THE STATE OF WISCONSIN, ET AL.,
Respondents.

BRIEF OF WISCONSIN DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-258

BUCYRUS-ERIE COMPANY,
Petitioner,

v.

THE DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS OF THE STATE OF WISCONSIN, ET AL.,

Respondents.

BRIEF OF WISCONSIN DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

QUESTION PRESENTED

Does the Employee Retirement Income Security Act (ERISA) preempt application of the Wisconsin Fair Employment Act to employee benefit plans which are regulated by ERISA and which are alleged to be sex discriminatory because they do not provide the same benefits for pregnancy disability as are provided other temporary disabilities?

ARGUMENT

I. The Petition For A Writ Of Certiorari Should Be Denied Because The Decision Of The Seventh Circuit Is Consistent With The Majority Of Courts Which Have Considered The Issue Of ERISA Preemption Of State Fair Employment Laws.

Petitioner Bucyrus-Erie Company asserts two reasons why its petition for a writ of certiorari should be granted. First, the Company contends that the decision of the Seventh Circuit Court of Appeals conflicts with decisions of two other circuit courts of appeal. Second, the Company contends that the decision of the Seventh Circuit subjects the Company's employee benefit plan to inconsistent state regulation which would frustrate the purpose of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001, *et seq.* Such reasons do not withstand careful analysis and do not provide an adequate basis for a writ of certiorari.

The precise question decided by the Seventh Circuit and the question presented to this Court is whether ERISA preempts application of the Wisconsin Fair Employment Act, secs. 111.31-111.37, Wis. Stats., to employee benefit plans which are regulated by ERISA and which are alleged to be sex discriminatory because they do not provide the same benefits for pregnancy disability as are provided for other temporary disabilities. The Seventh Circuit decided "that Congress did not intend [ERISA] to preempt the enforcement of state fair employment laws." *Bucyrus-Erie Co. v. Dept. of Industry, Labor, and Human Relations*, 599 F. 2d 205, 207 (7th Cir. 1979).

The decision of the Seventh Circuit is consistent with the majority of courts which have considered the issue of ERISA preemption of state fair employment laws and have concluded that such state laws are *not* preempted. *Liberty Mut. Ins. Co. v. State Div. of Human Rights*, 61 A.D. 2d 822 (N.Y. Sup. Ct., App. Div., Feb. 21, 1978); *St. Vincent's Medical Center of Richmond v. State Human Rights Appeal Board*, 59 A.D. 2d 778 (N.Y. Sup. Ct., App. Div., Oct. 31, 1977), *cert. denied*, No. 78-592, 47 U.S.L.W. 3394, 3455 (Jan. 8, 1979); *Westinghouse Electric Corp. v. State Human Rights Appeal Board*, 60 A.D. 2d 943 (N.Y. Sup. Ct., App. Div., Jan. 19, 1978), *cert. denied*, No. 78-758, 47 U.S.L.W. 3441, 3455 (Jan. 8, 1979); *Goodyear Tire & Rubber Company v. Department of Industry, Labor and Human Relations*, 87 Wis. 2d 56, 273 N.W. 2d 786 (Wis. Ct. Apps., 1978); *Time Insurance Co. v. Department of Industry, Labor and Human Relations*, Case No. 154-423, 16 FEP Cases 391 (Dane Co. Cir. Ct., Jan. 3, 1978); *Gast v. State of Oregon*, No. CA 9686, 18 FEP Cases 210 (Ore. Ct. Apps., Oct. 2, 1978); *Illinois Bell Tel. Co. v. Fair Employment Practices Commission*, 386 N.E. 2d 599 (Ill. Ct. Apps., 1979); *Minnesota Mining and Manufacturing Company v. Department of Human Rights*, Nos. 49079, 49137 (Minn. Sup. Ct., Aug. 10, 1979); *Brown Company v. Department of Industry, Labor and Human Relations*, No. 77-C-29 (W.D. Wis., Aug. 28, 1979); *Lukus v. Westinghouse Electric Corporation*, No. GD 77-14803 (Penn. Ct. Comm. Pleas., Allegheny Co., April 20, 1978); *contra*, *Pervel Industries Inc. v. Connecticut Commission of Human Rights*, 468 F. Supp. 490 (D. Conn., 1978), *aff'd*, No. 78-7604 (2d Cir., April 23, 1979), *pet. for cert. filed*, No. 79-107, 48 U.S.L.W. 3025 (July 23, 1979); *Mountain States Telephone & Telegraph Co. v. Commissioner of Labor and Industry*, No. 41908 (Mont. 1st. Jud. Dist., Lewis and Clark Co., August 14, 1978).

The Company contends that the decision of the Seventh Circuit conflicts with the decision of the Ninth Circuit in *Hewlett-Packard Co. v. Barnes*, 571 F. 2d 502 (9th Cir., 1978) and with the decision of the Second Circuit in *Pervel Industries, Inc. v. Connecticut Commission on Human Rights*. The Department disagrees.

Hewlett-Packard Co. v. Barnes clearly is distinguishable. It did not involve the question of whether ERISA preempted enforcement of a state fair employment law. Rather, it involved the question of whether ERISA preempted a state health care statute which regulated such areas as funding, disclosure and sales practices. The Ninth Circuit had no difficulty deciding that ERISA preempted the state statute since the principal purpose of ERISA is to curb funding and disclosure abuses in employee benefit plans by creating minimum federal safeguards. *See Wadsworth v. Whaland*, 562 F. 2d 70, 73-74 (1st Cir., 1977); 29 U.S.C. § 1001. State fair employment laws, however, are different. Thus, District Judge Renfrew who found ERISA preemption in the lower court decision in *Hewlett-Packard Co. v. Barnes*, 425 F. Supp. 1294 (N.D. Cal., 1977), found no ERISA preemption of a state community property law which required employee benefit plans subject to ERISA to pay part of a participant's benefits to a divorced spouse, *Stone v. Stone*, 450 F. Supp. 919 (N.D. Cal., 1978), citing as authority *Time Insurance Company v. Department of Industry, Labor and Human Relations*, 16 FEP Cases 391 [holding that ERISA did not preempt application of the Wisconsin Fair Employment Act].

The Second Circuit decision in *Pervel Industries, Inc. v. Connecticut Commission on Human Rights*, concluding that ERISA once preempted the Connecticut fair employment statute, is confusing. Its "brief affirmance ... infers that state fair employment laws

were preempted by ERISA but were somehow reinstated by the passage of the federal pregnancy disability act." *Bucyrus-Erie Co. v. Department of Industry, Labor and Human Relations*, 599 F. 2d at 212-213, n. 13. Thus, in prospective terms, the decision of the Seventh Circuit in *Bucyrus-Erie* and the decision of the Second Circuit in *Pervel* are not in conflict since both conclude that ERISA does *not* preempt state fair employment laws, at least not since the amendment of Title VII of the Civil Rights Act, 42 U.S.C. § 2000e *et seq.*, by the Pregnancy Disability Act. Pub. L. No. 95-555, 92 Stat. 2076.

To the extent that the Second Circuit decision in *Pervel* conflicts in retroactive terms with the Seventh Circuit decision in *Bucyrus-Erie*, the *Pervel* decision is at odds with the overwhelming majority of courts which have found *no* ERISA preemption of state fair employment laws. The Second Circuit decision in *Pervel* adopts the reasoning of the district court which rejected the argument that ERISA preemption of state fair employment laws would alter or modify federal antidiscrimination law (Title VII), contrary to ERISA. 468 F. Supp. at 493. Although the *Pervel* decisions reject the simple syllogism that Title VII preserves state fair employment laws, ERISA preserves Title VII, and therefore, ERISA preserves state law, they fail to address the very pragmatic problems (increased federal spending and/or an increased federal case backlog) which ERISA preemption would engender in the federal anti-discrimination enforcement scheme which specifically incorporates state fair employment laws. *Cf. Bucyrus-Erie Co.*, 599 F. 2d at 210-212. Thus, any *retroactive* conflict between the *Pervel* and *Bucyrus-Erie* decisions does not provide an adequate basis for granting certiorari.

II. The Petition For A Writ Of Certiorari Should Be Denied Since The Decision Of The Seventh Circuit Does Not Subject The Company's Employee Benefit Plan To Inconsistent State Regulation.

The Company's second reason why its petition for a writ of certiorari should be granted is based on its contention that the Seventh Circuit's decision in *Bucyrus-Erie* would subject the Company's employee benefit plan to inconsistent state regulation, contrary to the purposes of ERISA. This contention is wholly without merit.

First, as the district court noted in *Pervel*, 468 F. Supp. at 493, "ERISA does not mandate uniformity of plan benefits, and therefore preemption of state anti-discrimination laws is not required to maintain any scheme for federally-required uniformity of benefits." Second, the decision of the Seventh Circuit in *Bucyrus-Erie* merely freed the Department to apply the sex discrimination prohibition of the Wisconsin Fair Employment Act to the Company's employee benefit plan. The Wisconsin Fair Employment Act has been interpreted to mean that it is sex discriminatory to treat pregnancy disability differently than other temporary disabilities. *Ray-O-Vac v. ILHR Department*, 70 Wis. 2d 919, 236 N.W. 2d 209 (1975); *Kurtz v. City of Waukesha*, 91 Wis. 2d 103, 280 N.W. 2d 757 (1979). Since Bucyrus-Erie Company is a multi-state employer subject to Title VII, and since Title VII was amended by the Pregnancy Disability Act to require subject employers in *all* states to treat pregnancy disability the same as other temporary disabilities, application of the Wisconsin Fair Employment Act to the Company's employee benefit plan [as permitted by the Seventh Circuit's decision in *Bucyrus-Erie*] will *not* subject the Company plan to inconsistent state regulation. In practical effect, the pregnancy disability amendments to Title VII have mooted prospectively the entire controversy over employer treatment of pregnancy disability for employers like the Company who are subject to Title VII.

III. The Petition For A Writ Of Certiorari Should Be Denied Because ERISA Preemption Of State Fair Employment Laws (1) Would Alter And Impair The Federal Framework For Prohibiting Employment Discrimination, And (2) Would Cause A Regulatory Void As To Employers Subject To ERISA But Not Subject To Federal Anti-Discrimination Law.

Apart from the reasons set forth in the preceeding sections of its argument, the Department submits that the petition for a writ of certiorari should be denied because ERISA preemption of state fair employment laws (1) would alter and impair the federal framework for prohibiting employment discrimination, and (2) would cause a regulatory void as to employers subject to ERISA but not subject to federal anti-discrimination law. As the Seventh Circuit concluded in *Bucyrus-Erie Co.*, 599 F. 2d at 210-211:

> [W]e believe that there is evidence outside section 514 of ERISA revealing a congressional intent to preserve the application of state fair employment laws in general, and pregnancy disability laws in particular. We find, however, that this intention to except

state fair employment laws from preemption need not be implied. Instead, we rely on this evidence of intent to conclude that the preemption of state fair employment laws would operate to "alter, amend, modify, invalidate, impair or supersede" another federal "law, rule or regulation" in contravention of an express exception in section 514 of ERISA. 29 U.S.C. § 1144 (d).

. . . .

Preemption of state fair employment laws would at a minimum "alter," and probably "impair," the Congressional scheme for preventing and penalizing employment discrimination in the administration of welfare benefit plans in contravention of section 514 (d). This conclusion derives support from a variety of sources: the provisions and legislative history of Title VII, the legislative history of ERISA, and the legislative history of the recently enacted federal pregnancy disability amendments to Title VII. ... [I]t is clear that the federal scheme embodied in its laws, rules and regulations contemplates and encourages enforcement of state fair employment statutes as an integral component of the federal statutory framework. State laws are specifically preserved in two sections of Title VII and Title XI, section 708, 42 U.S.C. § 2000e-7, and section 1104, 42 U.S.C. § 2000h-4.

Congress also designed an enforcement system premised on the enforcement and preservation of state fair employment laws. Federal agency action is deferred until a state has had an initial opportunity to remedy the employment discrimination charged. See 42

U.S.C. §§ 20003-5 (c), (d), (e). Further, under § 2000e-5 (b) the EEOC must "accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law" in determining whether there is reasonable cause to believe a discrimination charge. To preempt the application of state fair employment laws to employee benefit plans would also cause a regulatory void as to employers not subject to Title VII but operating plans covered by ERISA.

The importance of this federal-state relationship was underscored by Senator Clark in the Senate debates on Title VII:

> It is important to note that title VII is so drafted that the States and the Federal Government can work together. When the Bill is enacted, the State ... agencies will continue in force, except where they are inconsistent with title VII. The Federal Commission can agree under title VII not to bring any suits in cases in a particular State ... where the State ... has adequate power under its own laws ... to carry out the purposes of the act and it is effectively exercising that power.
>
> In addition, the Federal Commission can make arrangements to use and pay for the services of State ... agencies in carrying out its duties under the Federal law if the State agencies are willing.
>
> So, I take it that title VII meshes nicely, logically, and coherently with the State ... legislation already in existence in a number of the States ... The Federal Government and the State governments could cooperate effectively

> and, to some extent at least, there would be a saving in the Federal budget in those areas where State laws are effective, discrimination is outlawed, and discriminators are prosecuted.

110 CONG. REC. 7205 (1964).

ERISA preemption of state fair employment laws would alter and impair the enforcement machinery of Title VII. EEOC no longer could defer to states complaints alleging that employee benefit plans discriminate on the basis of race, sex, religion, etc. This covers a large area since an "employee benefit plan" is defined in ERISA to include plans providing pension, health care, accident, disability, death, unemployment and vacation benefits, and also providing apprenticeship or other training programs, day care, scholarship funds and prepaid legal services. 29 U.S.C. §§ 1002 (2) and (3). The result would be increased federal spending or an increased federal backlog. EEOC would have to process all such complaints on its own where previously the states processed complaints within their concurrent jurisdiction. Also, federal courts would have to hear and decide cases now handled by state administrative agencies and state courts.

ERISA preemption of state fair employment laws also would create a regulatory vacuum. An employer subject to ERISA, 29 U.S.C. § 1003, but not subject to Title VII (having fifteen or fewer employees), 42 U.S.C. § 2000e (b), would be free to discriminate regarding employee benefit plans on the basis of race, sex, religion, etc. Thus, such an employer could preclude a black employee, solely on the basis of race, from pension, health care, accident, disability, death, unemployment and vacation benefits, and from apprenticeship and other training programs, day care, scholarship funds and prepaid legal services. 29 U.S.C.

§§ 1002 (2) and (3). Consequently, while persons employed by larger employers would be protected by Title VII against such discrimination, persons employed by smaller employers would be without recourse.

Such regulatory void compelled the court in *Gast v. State of Oregon,* 18 FEP Cases at 214-215, 217, to conclude that ERISA did not preempt Oregon's fair employment statute. The court commented:

> The question remains whether the broad language of 29 U.S.C. § 1144 (a) preempts the type of state regulation at issue here.
>
> . . . .
>
> (I)f we are to adopt the construction of 29 U.S.C. § 1144 (a) advanced by plaintiffs, we must import to Congress not only an intent to preempt state law, but also an intent to cease all governmental regulation, state or federal, other than the disclosure and fiduciary requirements. ... There is nothing in the legislative history suggesting such an intent.
> . . . .
>
> We decline to make such a broad interpretation in the absence of any legislative declaration that Congress intended to create an enormous regulatory vacuum in areas that traditionally have been matters of vital state concern.

CONCLUSION

The decision of the Seventh Circuit in *Bucyrus-Erie* is consistent with the majority of courts which

have considered the issue of ERISA preemption of state fair employment laws. The Second Circuit decision in *Pervel,* the only other federal appellate court decision on the issue of ERISA preemption of state fair employment laws, is not in conflict with *Bucyrus-Erie.* Both *Pervel* and *Bucyrus-Erie* conclude that ERISA does *not* presently preempt state fair employment laws.

The decision of the Seventh Circuit in *Bucyrus-Erie* does not subject the Company to inconsistent state regulation. Since Amendment of Title VII by the Pregnancy Disability Act, the Company has been required to treat pregnancy disability the same as other temporary disabilities in *all* states in which it operates — not solely in Wisconsin.

ERISA preemption of state fair employment laws would alter and impair the federal framework for prohibiting employment discrimination. Further, ERISA preemption would cause a regulatory void as to employers subject to ERISA but not subject to Title VII.

It is respectfully submitted that the petition of Bucyrus-Erie Company for a writ of certiorari should be denied.

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